In the

Supreme Court of the United States

October Term, 1915.

No. 50

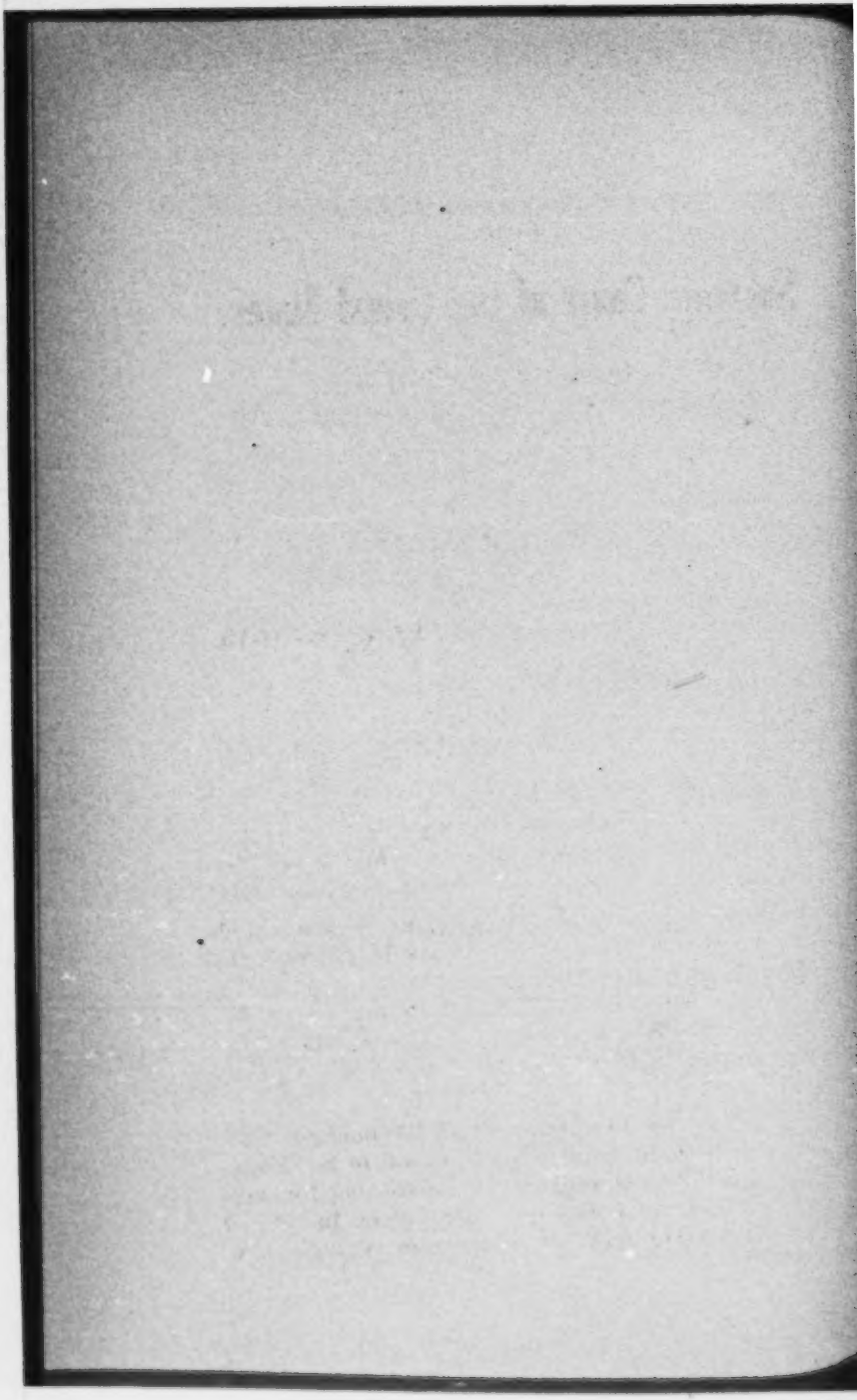
A. B. CROWL, *Plaintiff in Error,*

vs.

THE COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

MOTION TO ADVANCE CASE.

WILLIAM M. HARGEST,
Deputy Attorney General.
Attorney for Defendant in Error.



In the

Supreme Court of the United States

October Term, 1915.

No. 275.

A. B. CROWL, *Plaintiff in Error,*

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

MOTION TO ADVANCE.

To the Honorable Edward Douglass White, Chief Justice, and the Associate Justices of the Said Court:

The Commonwealth of Pennsylvania, Defendant in Error, respectfully moves the Court to advance the hearing in the above stated case.

This case involves the violation of an Act of Assembly of the Commonwealth of Pennsylvania, approved March 24, 1909, (Pamphlet Laws 63), which is entitled:

> "An act for the protection of the public health; and to prevent fraud and deception in the manufacture, sale, offering for sale, exposing for sale, and having in possession with intent to sell, of adulterated or deleterious ice cream; fixing a stan-

STATE OF PENNSYLVANIA, }
County of Dauphin } ss:

Personally appeared before me, a Notary Public, duly authorized to administer oaths, James Foust, Dairy and Food Commissioner of the State of Pennsylvania, who being duly sworn says that the facts stated in the foregoing motion are true and correct to the best of his knowledge and belief.

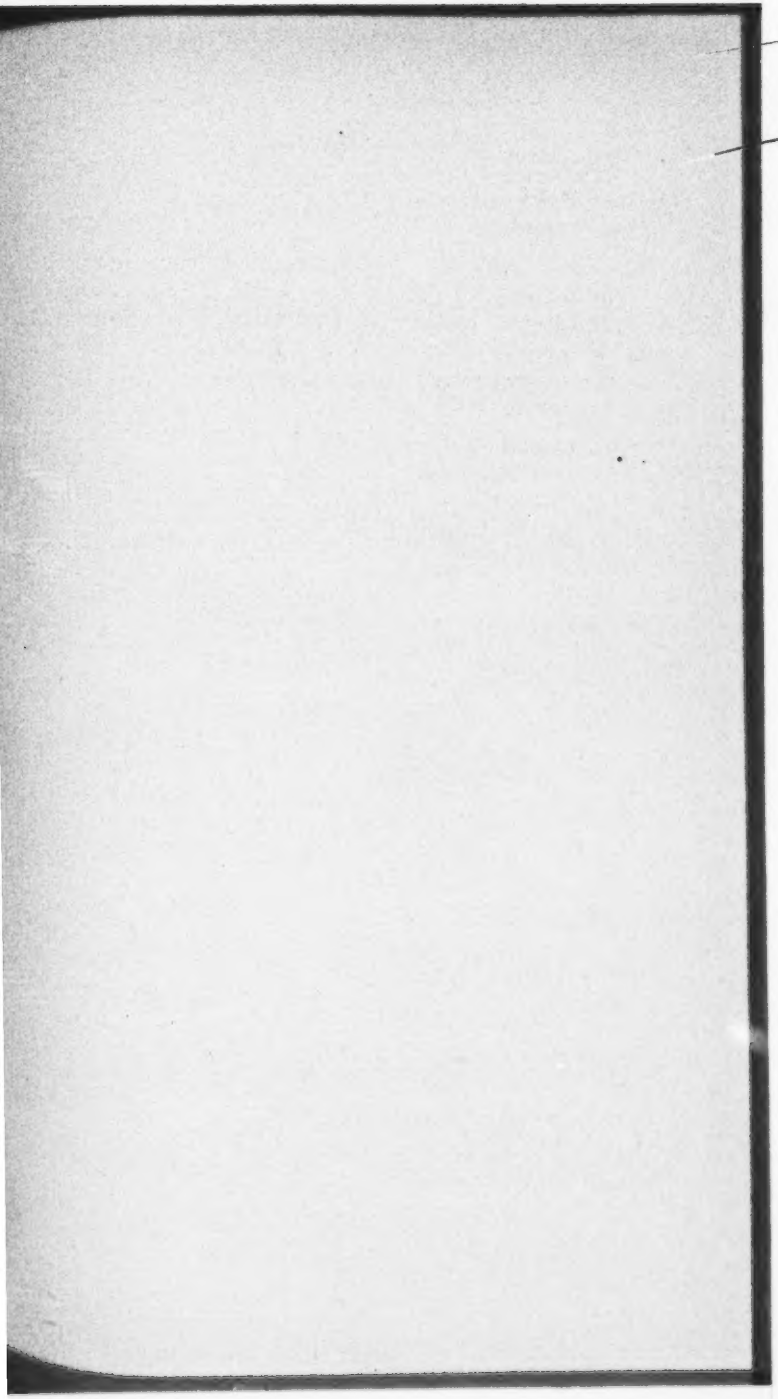
Sworn to and subscribed this
.... day of ~~September~~ October, 1915.

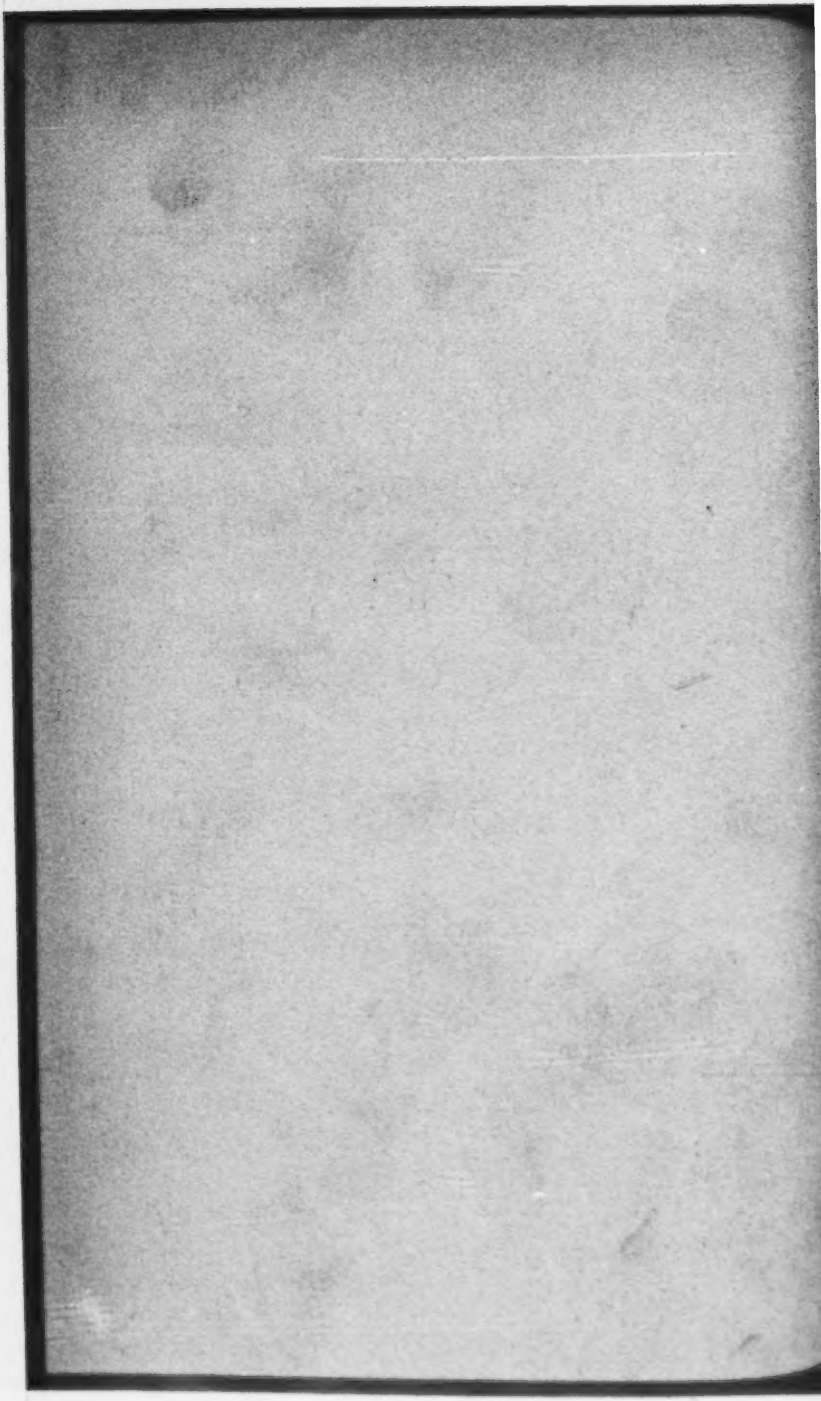
(Sgd) Edwin C. Denny
Notary Public

(Seal)

My Commission Expires
March 20th, 1917.

(Sgd). James Foust





SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. [redacted]50

A. B. CROWL, PLAINTIFF IN ERROR,

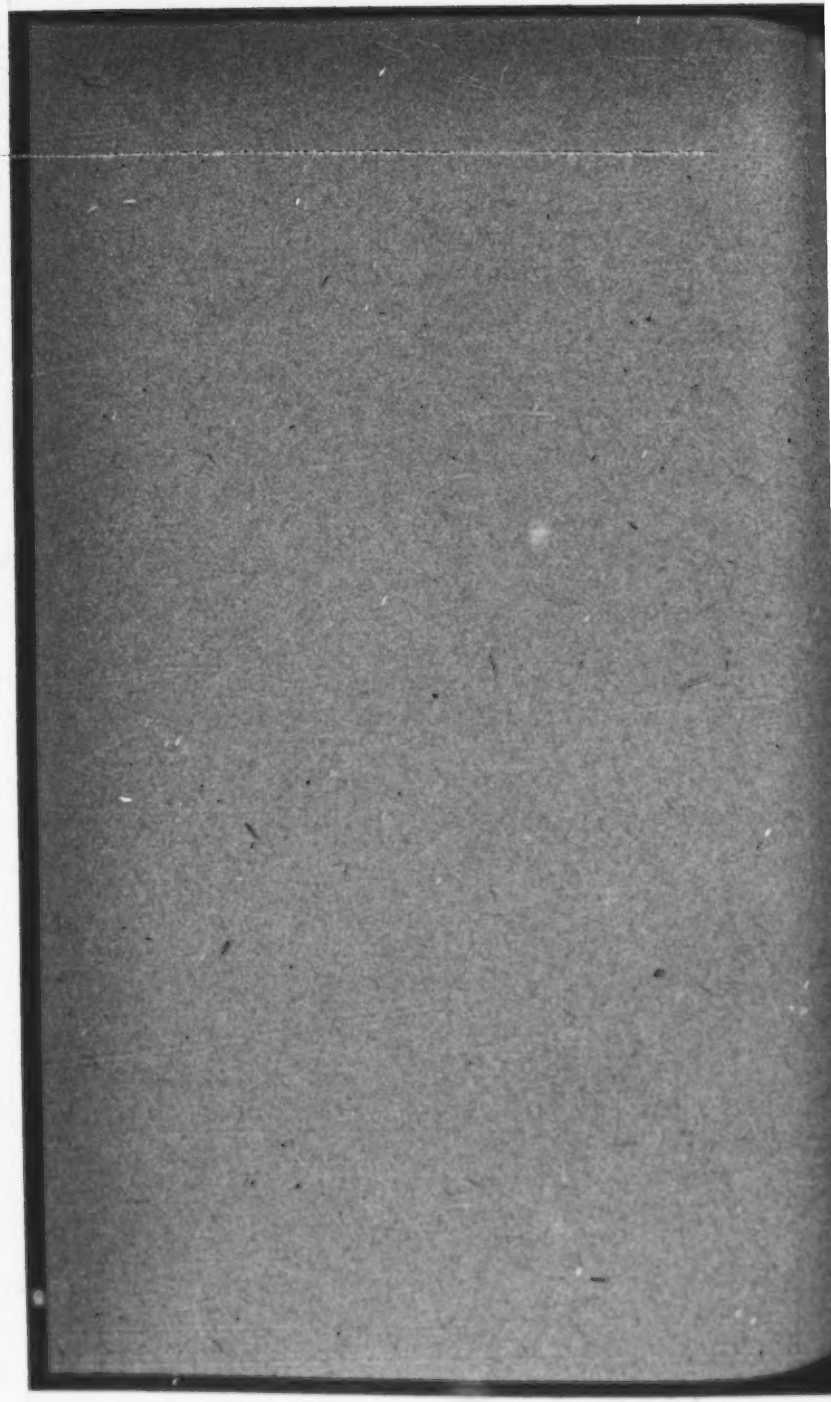
vs.

THE COMMONWEALTH OF PENNSYLVANIA,
DEFENDANT IN ERROR.

AFFIDAVIT IN OPPOSITION TO MOTION TO ADVANCE CASE.

WALTER JEFFREYS CARLIN,
Attorney for Plaintiff in Error.

(24,424)



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 275.

A. B. CROWL, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

AFFIDAVIT IN OPPOSITION TO MOTION TO ADVANCE CASE.

To the Honorable Edward Douglass White, Chief Justice, and the Associate Justices of the said Court:

A. B. Crowl, the plaintiff in error, respectfully opposes the motion made by the Commonwealth of Pennsylvania to advance the hearing in the above-entitled case for the following reasons:

That the question involved in the case is an important one, affecting the entire ice-cream industry, and the case is a test case, the defense of which is being conducted by the National Association of Ice-Cream Manufacturers, and it

will affect legislation in numerous States throughout the United States.

That investigations are being made by the National Association of Ice-Cream Manufacturers which have not yet been completed and which it wishes to submit to the court on the hearing of this case, and that said investigations could not be completed for at least a month from date.

That there is another case pending in the court, same being No. 235 on the October term, which involves the constitutionality of a standard for ice cream which fixes the standard of butter fat at 14 per cent and limits the ingredients to be used.

That all of the facts contained in both cases can be presented to the court at one time, and that it is the intention of the parties to ask that the two cases be heard at the same time, and your deponent respectfully requests that if the case be advanced at all, it be advanced to be heard in the usual order with said case No. 235.

It is respectfully submitted that no reason is given in the motion for the advancement of the case because the ice-cream season is now ended and will not again commence until May of the following year, whereas this case will be heard in its usual order in or about March, 1916.

For these reasons the plaintiff in error respectfully asks that the motion to advance the case be denied.

WALTER JEFFREYS CARLIN,
Attorney for Plaintiff in Error.

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Walter Jeffreys Carlin, being duly sworn, deposes and says that he is the attorney for the plaintiff in error in this case, and is also attorney for the plaintiff in error in case No. 235 of the October term of this court; that the facts stated in the foregoing affidavit are true to his own knowledge; that the reason that this affidavit is not made by the plaintiff in error is that the plaintiff in error is not in the same State that your deponent is, and that the motion papers were just served upon your deponent, and it would be impossible to send the papers to the plaintiff in error and have them printed so as to be presented on the 18th instant.

WALTER JEFFREYS CARLIN.

Sworn to before me this 13th day of October, 1915.

PAUL C. WERNER,
Commissioner of Deeds for the City of New York, Residing in New York County.

County Clerk's No. 1125; Register's No. 17066.
Certificate filed in Kings County.
County Clerk's No. 211; Register's No. 7045.
Commission expires June 8, 1917.

SUBJECT INDEX.

INDEX OF AUTHORITIES CITED.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 50.

A. B. CROWL, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

This is a writ of error upon a judgment of the Supreme Court of Pennsylvania (Rec., 104) which affirmed a judgment of the Superior Court of Pennsylvania (R., 88), which court had affirmed a judgment of the Court of Quarter Sessions of Erie County, Pennsylvania (Rec., 86).

The plaintiff in error and one W. F. Lewis were indicted for selling "adulterated ice cream," and on motion the court quashed the indictment (Rec., 1, 4). Thereupon a new indictment was procured (Rec., 1), which charged no adulteration, but merely that A. B. Crowl and W. F. Lewis sold "chocolate ice cream, which then and there contained less than eight per centum butter fat, and not then and there being flavored with fruit or nuts, contrary to the form of the act of the General Assembly in such case made and pro-

vided, and against the peace and dignity of the Commonwealth of Pennsylvania" (Rec., 10).

Defendants below raised the question of the constitutionality of the act in question under the Constitution of the United States by demurrer, which was overruled (Rec., 8). Thereupon a trial before a jury was had and plaintiff in error was found guilty and his partner W. F. Lewis was acquitted. The constitutional question was also raised by requests to charge, which were refused (Rec., 12, 85), and by motion in arrest of judgment (Rec., 14), which was overruled (Rec., 19).

The main questions which were presented to the jury were two: First, Was the product that was sold by plaintiff in error ice cream? (Rec., 80, 84), and, second, Did the ice cream so sold contain less than 8 per cent of butter fat? (Rec., 80).

The court expressly charged the jury:

> "That unless the jury find from the evidence that the product sold was chocolate ice cream the verdict of the jury must be not guilty" (Rec., 84);

so we must here consider that the jury did actually find that the product sold was ice cream.

The statute of Pennsylvania on which the prosecution is based is as follows (P. L., 63, Purden's Digest, vol. 5, p. 529):

> "An act for the protection of the public health and to prevent fraud and deception in the manufacture, sale, offering for sale, exposing for sale, and having in possession with intent to sell, of adulterated or deleterious ice cream; fixing a standard of butter fat for ice cream; providing penalties for the violation thereof, and providing for the enforcement thereof.
>
> "SECTION 1. *Be it enacted, &c.*, That no person, firm or corporate body, by himself, itself or themselves, or by his, her or their agents, servants, or employees, shall sell, offer for sale, expose for sale, or have in possession with intent to sell, ice cream adulterated within the meaning of this act.

"SECTION 2. Ice cream shall be deemed to be adulterated within the meaning of this act—

"*First.* If it shall contain boric acid, formaldehyde, saccharin, or any other added substance or compound that is deleterious to health.

"*Second.* If it shall contain salts of copper, iron oxide, ochres, or any coloring substance deleterious to health; *Provided,* That this paragraph shall not be construed to prohibit the use of harmless coloring matter in ice cream, when not used for fraudulent purposes.

"*Third.* If it shall contain any deleterious flavoring matter, or flavoring matter not true to name.

"*Fourth.* If it be an imitation of, or offered for sale under, the name of another article.

"SECTION 3. Nothing in this act shall be construed to prohibit the use of fresh eggs, and not exceeding one-half of one per centum of pure gelatin, gum tragacanth, or other vegetable gums.

"SECTION 4. No ice cream shall be sold within the State containing less than eight (8) per centum butter fat, except where fruit or nuts are used for the purpose of flavoring, when it shall not contain less than six (6) per centum butter fat.

"SECTION 5. It shall not be lawful for any person, firm or corporate body to sell, offer for sale, expose for sale, or have in possession with intent to sell, any ice cream in any container which is falsely labeled or branded as to the name of the manufacturer thereof; or to misrepresent, in any way, the place of manufacture of the ice cream or the manufacture thereof.

"SECTION 6. Any person, firm, or corporate body who shall violate any of the provisions of this act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not less than twenty-five (25) dollars, nor more than fifty (50) dollars.

"SECTION 7. The Dairy and Food Commissioner shall be charged with the enforcement of the provisions of this act.

"SECTION 8. All fines and penalties imposed and recovered for the violation of any of the provisions of this act shall be paid to the Dairy and Food Commis-

sioner or his agent, and, when so collected and paid, shall thereafter be, by the Dairy and Food Commissioner, paid into the State Treasury for the use of the Commonwealth.

"Approved the 24th day of March, A. D. 1909."

The only question involved in this case is the question of the constitutionality of section 4 of the above act, which is as follows:

> "SECTION 4. No ice cream shall be sold within the State containing less than eight (8) per centum butter fat, except where fruit or nuts are used for the purpose of flavoring, when it shall not contain less than six (6) per centum butter fat."

When the Supreme Court of Pennsylvania held the section in question to be constitutional (Rec., 104) plaintiff in error sued out his writ of error from the said ruling and decision of the Supreme Court of Pennsylvania to the Supreme Court of the United States, which was allowed by Mr. Justice Pitney (Rec., 104).

In October, 1915, on behalf of the Commonwealth of Pennsylvania, a motion to advance this case was made and opposed by plaintiff in error, who asked that the case be heard with the case of The Hutchinson Ice Cream Company and C. J. Hutchinson, manager, *vs.* The State of Iowa (No. 40, October term, 1916), and this court on November 8, 1915, entered an order directing the cases to be heard at the same time.

As these cases are heard together and involve questions somewhat similar, attention is directed to the briefs filed in the Iowa case.

Specifications of Error.

The Supreme Court of Pennsylvania erred in holding and deciding:

First. That the act of March 24, 1909, of the General

Assembly of the Commonwealth of Pennsylvania did not abridge the privileges and immunities of citizens or of the plaintiff in error (defendant below) nor deprive him of liberty or property without due process of law nor deny to him the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Second. That the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania did not abridge the privileges and immunities of citizens or of the plaintiff in error (defendant below) nor deprive him of his liberty or property in prohibiting the sale of ice cream under its own name unless the said ice cream contained the percentage of butter fat required by section 4 of the said act.

Third. That the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania did not abridge the privileges and immunities of citizens or of the plaintiff in error (defendant below) nor deprive him of his liberty or property in prohibiting the sale of ice cream either under the name of ice cream or under any other name unless the said ice cream contain the percentage of butter fat required by section 4 of the said act.

Fourth. That the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania, and particularly section 4 thereof, did not establish an arbitrary classification and did not deny the plaintiff in error (defendant below) the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in prohibiting the sale of ice cream under any name unless the said ice cream contain the amount of butter fat specified in said section of said act and in dividing ice-cream into two classes, one of which contains fruit or nuts for the purpose of flavoring and the other which did not contain such fruit or nuts for flavoring, and requiring 8

per cent of butter fat where fruit or nuts were not used for flavoring purposes and 6 per cent where they were.

Fifth. That the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania was not an arbitrary and unreasonable regulation and interference with a lawful business and did not abridge the privileges and immunities of the plaintiff in error (defendant below) nor deprive him of his liberty or property as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

Sixth. That the legislature of the State had the right under the police power to prohibit the sale of a wholesome article of food which was not a substitute for or an imitation of another product and absolutely prohibited the sale of such article of food, to wit, ice cream, unless the product conform to and contain the specified percentage of butter fat that section 4 of the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania required, and that the said act in so providing did not abridge the privileges and immunities of the plaintiff in error (defendant below) and deprive him of his liberty or property as guaranteed to him under the Fourteenth Amendment to the Constitution of the United States.

BRIEF OF ARGUMENT.

POINT I.

"Ice cream" is a generic term embracing a large number and variety of products; the name of the product does not imply the use of dairy cream in its composition and the statute in question does not define the term.

History and Meaning of the Term Ice Cream, appendix.

Muller *vs.* Oregon, 208 U. S., 412.

POINT II.

The act in question cannot be sustained under the police power, for it absolutely prohibits the sale of a wholesome article of food.

Rigbers *vs.* City of Atlanta, 66 S. E., 991.

Hutchinson Ice Cream Co. *vs.* State of Iowa, No. 40, October Term, 1916.

State *vs.* Hanson, 136 N. W., 412.

People *vs.* Marx, 99 N. Y., 384.

Powell *vs.* Pennsylvania, 127 U. S., 678.

Lochner *vs.* New York, 198 U. S., 45.

McFarland *vs.* American Sugar Refining Co., 241 U. S., 79.

Truax *vs.* Raich, 239 U. S., 33.

People *ex rel.* Farrington *vs.* Mensching, 187 N. Y., 8.

Schollenberger *vs.* Pennsylvania, 171 U. S., 1.

Point III.

The act does not tend to prevent fraud.

Heath & Milligan Co. *vs.* Worst, 207 U. S., 338.
Coppage *vs.* Kansas, 236 U. S., 1.
Murphy *vs.* California, 225 U. S., 623.
State *vs.* Layton, 61 S. W., 171.
People *vs.* Biesecher, 169 N. Y., 53.
State *vs.* Hanson, 136 N. W., 412.
Rigbers *vs.* City of Atlanta, 66 S. E., 991.
State *vs.* Campbell, 64 N. H., 404.
Commonwealth *vs.* Nente, 11 Allen, 264.
State *vs.* Smythe, 14 R. I., 100.
Truax *vs.* Raich, 239 U. S., 33.
People *ex rel.* Farrington *vs.* Mensching, 187 N. Y., 8.
State *vs.* Miksicek, 125 S. W., 507.
Dobbins *vs.* Los Angeles, 195 U. S., 223.
Lochner *vs.* New York, 198 U. S., 45.
Atchison, T. & S. F. R. Co. *vs.* Vosburg, 238 U. S., 56.
Price *vs.* Illinois, 238 U. S., 46.

Point I.

"Ice cream" is a generic term embracing a large number and variety of products; the name of the product does not imply the use of dairy cream in its composition and the statute in question does not define the term.

In the court below it was contended by the State that the term "ice cream" necessarily implied the presence in the product of some dairy cream and that the State was therefore justified in requiring 8 per cent of butter fat.

This view was followed in the opinion of the Superior

Court (Rec., 89), which was accepted by the Supreme Court (Rec., 104), for the court says:

> "Its name implies the use of cream in its composition and all of the authorities to which the learned counsel for the appellant refers show that milk and cream are constituents in its composition."

We contend that "ice cream" is not and never was a term used to designate a product containing any stated amount or proportion of butter fat, and that the word "cream," which is part of the said term, does not and never did mean dairy cream (Appendix, p. 4).

That ice cream is made in various ways, with and without cream and without any reference to the percentage of butter fat therein, we submit is fully shown by the appendix to our brief on the "History and Meaning of the Term Ice Cream," compiled by Professor Child, of the University of Pennsylvania. In this brief he discusses in detail the history of the use of ice cream (Appendix, p. 5) and demonstrates conclusively that the term "cream" in the compound "ice cream" is used in the sense of a mixture and not in the sense of cream of milk (Appendix, p. 12).

Professor Child discusses the dictionary definitions of ice cream (Appendix, p. 26); the familiar use of the term (Appendix, p. 27) and its technical use, and he states as a conclusion (Appendix, p. 36):

> "1. The origin, subsequent history, and present use of the term *ice cream* show that it has always covered a wide range of mixtures, the term *cream* meaning a mixture when it was used in the compound, and the range of mixtures being the same today, as regards use of cream of milk, milk, and eggs, as when the confection originated."

In defining the American use of ice cream Professor Child says:

"3. 3. DEFINITION OF AMERICAN USE OF THE TERM 'ICE CREAM.'

"We reach now the following result: The history of the rise and use of the confection, the derivation of its name in English, French and Italian, the history of the use of the term from its origin to the present, the evidence afforded by standard dictionaries (except that they fail to note its universal use as a primary class-term in America), its use in current literature, the testimony of cook books, the understanding and application of it by professional cooks, by private housekeepers, by manufacturers, and finally the universal popular use and understanding of the term, all coincide in confirming the accuracy of the following definition:

"1. SPECIFIC USE.

"Ice cream is a confection, or prepared food served as a delicacy, consisting of one of various 'creams' or mixtures, as further defined below, frozen to a more or less rigid consistency in a suitable vessel or special contrivance, whether by packing in a freezing mixture (usually ice and common salt), or by air, brine, etc., chilled by modern appliances, or by other methods, with or without agitation or beating, during the process of freezing, by means of a dasher or similar contrivance, to ensure smoothness and the desired consistency.

"BASIS OF THE 'CREAM' OR MIXTURE.—The basis of the 'cream' or mixture may be a 'cream' (as now understood), or a 'custard' (in its recent sense, custards having been formerly also called 'creams'), whence come two typical kinds of the confection.

"(*a*) A cream as the basis of the first type, may have, as its basic ingredient either cream of milk only, preferably not too thick, in which case thinning with milk is advised to prevent over-richness, the product when thus containing a high percentage of butter fat being termed 'Philadelphia ice cream' (or, commonly in trade use, 'straight cream ice cream') or cream of milk and milk, or cream of milk, milk, and other ingredients—as condensed milk,

eggs, etc.—or milk and other ingredients, in proportions to produce a mixture of desired or available character as regards richness, healthfulness, or cost, varying from a high cream of milk content to plain milk. In the latter case, consistency is gained by adding whole eggs or egg yolks and often cornstarch, and bringing the mixture to a boil producing a custard, which, when frozen, because of its characteristic taste is often called 'frozen custard.' This, as a cream with a custard basis forms a connecting link with the second type, from which it is distinguished by lack of richness.

"(*b*) The second type of ice cream uses as its basis, a custard of a desired degree of richness, made of cream of milk, milk, and eggs, and brought to a boil, the product being specifically known in cook books as 'Neapolitan ice cream' or 'custard ice,' and in trade use as 'French ice-cream' or as 'frozen custard,' according to the method employed in freezing. It is characteristically employed for elaborate fancy ice creams, 'frozen puddings,' etc., and includes among its varieties some of the richest ice creams.

"USE OF EGGS.—Eggs enter as above into all custard mixtures. To cream mixtures, the whites of eggs may be added for cohesion and smoothness, and a modicum of yolk for color, as individual preference may direct. This use of eggs, in both domestic and trade use, extends even to 'Philadelphia ice cream,' popularly supposed to be without eggs.

"SWEETENING AND FLAVORING.—The mixture, further, is sweetened and flavored, the flavoring consisting of essences, such as vanilla, wines, or liqueurs, and fruit juice, fruit pulp, etc.

"ADDITIONAL INGREDIENTS.—There may further be added solid substances, as contributing to the flavor, or as diversifying the consistency, or as delicious in themselves, such as whole or ground nuts candied fruit, powdered cake, or bread, etc. When the confection consists chiefly of such solid substances held together by ice cream, a special class of *ice cream* results known as 'frozen puddings.' There may further be added, as a 'stabilizer,' in place of the whites of eggs, a small amount of gelatin or vegetable

gum. In trade practice such addition is universal in ice creams of the first type described above.

"CHARACTERISTICS OF THE FINISHED PRODUCT.—After freezing, as above described, the confection may be served in the mass, or specially moulded into 'bricks' or other shapes, or variously ornamented. In respect to its uses, ice cream is a sweet dish, made and enjoyed for its palatability, due to its flavor, consistency, and agreeable coldness, and for its attractive appearance to the eye, as the result of its frozen state, or as colored by its ingredients, or as specially colored, or as arranged in layers differently colored, or as shaped in special forms by moulds or otherwise, or as decorated with fruits, nuts, jelly, cake, or other edible or nonedible ornamentation, or as served in any way which taste or fancy may dictate."

In the Iowa case submitted herewith (No. 40, October term, 1916) the statute purported to define ice cream, but in this case there is no definition at all. The act does not require the use of any *cream*, and from the act itself (which does not discuss ingredients at all, except that it permits the use of harmless coloring matter, fresh eggs, gelatine, gum tragacanth, or other vegetable gums and prohibits the use of certain deleterious substances, as to which we have no question here), it appears that what a manufacturer is required to do is to have 8 per cent of butter fat in his product. Whether he puts the same in by using milk and condensed milk or other substances, makes no difference under the act. The result is, what is called ice cream, containing 8 per cent of butter fat, can be made without using any cream at all. This is easily proven.

In the first place, the arbitrary percentage does not show the customer what percentage of cream, milk, or condensed milk has been used in the manufacture of the product sold him.

It certainly does not show him what percentage of the other solids of milk, not fat, he is receiving, and it does not show the percentage of milk or cream or condensed milk in the product, as a few examples will show.

To make a batch of 100 pounds (which will make anywhere from 14 to 20 gallons finished, to which a reference will be made later), and remembering that all the butter fat in the product must come from the milk, cream, and condensed milk, we find that we must have 82 pounds of milk, cream, and condensed milk to get 8 pounds of fat. So we have

82 lbs. milk, etc. (8 lbs. milk fat).
16 lbs. sugar.
2 lbs. allowed for flavor, gelatine, and water for dissolving gelatine.

---

100 lbs. materials—8 lbs. fat.

Assuming that we always use the same amount of sugar, flavor, etc., we have 82 pounds of materials which must contain the 8 pounds of fat, and we can get the fat in many ways.

Milk and cream alone—more milk than cream:

36.2 lbs. 18% cream.
45.8 lbs. 3¼% milk.
16.0 lbs. sugar.
2.0 lbs. flavor, gelatine, and water.

---

100 lbs. 8% fat.

Milk, cream, and condensed milk—more milk and more condensed milk than cream:

24.4 lbs. 18% cream.
28.8 lbs. 9¼% condensed milk.
28.8 lbs. 3¼% milk.
16.0 lbs. sugar.
2.0 lbs. flavor, gelatine, and water.

---

100 lbs. 8% fat.

Milk, cream, and condensed milk—more milk than either condensed milk or cream:

25.7 lbs. 18% cream.
25.7 lbs. 9¼% condensed milk.
30.6 lbs. 3¼% milk.
16.0 lbs. sugar.
2.0 lbs. flavor, gelatine and water.

100 lbs. 8% fat.

Proportions of milk, cream, and condensed milk can be varied in a number of ways, still giving the required 8 pounds in the 82 pounds of milk liquid. Extreme variation would be to *discard cream and milk altogether* and use 82 pounds of 9¾ per cent condensed milk or a fatter condensed milk and cut back with milk, skim milk or water.

So we see that under the statute a purchaser would not know what percentage of milk, cream or condensed milk was used in the manufacture of the ice cream offered to him, nor would he know whether skimmed milk or skimmed condensed milk had been used. Nothing in the statute forbids their use and the required percentage can be obtained, for example:

Condensed milk, cream, skimmed milk:

50 lbs. 9¼% condensed milk (4⅝ lbs. fat).
18¾ lbs. 18% cream (3⅜ lbs. fat).
13¼ lbs. skimmed milk (no fat).
16 lbs. sugar.
2 lbs. flavor, gelatine and water.

100 lbs. 8% fat.

Condensed skim milk, cream, skimmed milk:

30 lbs. condensed skim milk (no fat).
43 1/3 lbs. 18% cream (8 lbs. fat).
8⅔ lbs. skimmed milk (no fat).
16 lbs. sugar.
2 lbs. flavor, gelatine and water.

100 lbs. 8% fat.

Now, take any of the foregoing mixtures, all of which are "legal" and do not deceive or defraud anyone, and take out 8 pounds of the milk liquids and substitute 8 pounds of eggs and our butter fat point falls to 7.22 per cent. It is a better *and more expensive food,* but illegal—if the statute is valid. Now, being illegal, take out of it 10 pounds of the sugar, making it a poorer and cheaper food and less palatable and it is "legal" once more.

Or, take any of the foregoing "legal" mixtures, add 8 pounds of eggs and the butter fat point falls to 7.4. The purchaser is getting all he was to get originally and the eggs in addition—is he defrauded? Yet the mixture is now "illegal." Rob the mixture of 8 pounds of the sugar and the butter fat point rises again to 8 per cent.

Having shown that under this regulation the consumer is not informed as to the percentage of cream or of milk or of condensed milk present, let us go further and see if he is shown the amount of butter fat present in the measured quantity he purchases, for he does not purchase a weighed quantity.

As stated above, the batches of 100 pounds given as examples will make anywhere from 14 to 20 gallons of finished product, depending upon how much the volume of the mass is increased in the process of freezing.

The measure of the value of the product is made, not the amount of butter fat, but the percentage of butter fat, so that the measure is not the amount of butter fat that the

consumer would receive in a given portion of ice cream, but rather the percentage; for example, a purchaser might readily get more fat by weight in a seven per cent ice cream than he would in buying an eight per cent ice cream. That is, he might buy a pint of ice cream which only had seven per cent of butter fat and yet actually get more butter fat than he would if he purchased a pint of ice cream containing eight per cent of butter fat.

We see, therefore, that this is not an act to require ice cream to contain any cream or to be made solely of cream. Neither does the act use or refer to the word "cream" used either in the sense of cream of milk or in the sense of a mixture.

The statute in question does not even purport to define either the term or the product. We ask the court to follow the practice as established in the case of Muller *vs.* Oregon, 208 U. S., 412, and consider the facts presented in the appendix, which we submit establish our contentions as above set forth.

Point II.

The act in question cannot be sustained under the police power, for it absolutely prohibits the sale of a wholesome article of food.

The act does not attempt to standardize ice cream; in fact, it recognizes as ice cream all products heretofore sold under that name, but directs that in the future "no ice cream shall be sold unless it contains 8 per cent of butter fat." The court below has so interpreted the act, first, by quashing the indictment, which charged adulteration; it held that in this case there was no question of adulteration; and second, by charging the jury that they must find that the product sold actually was ice cream. The verdict that the plaintiff in error was guilty is therefore necessarily a finding

that the product sold was ice cream which contained less than 8 per cent butter fat.

The chemist for the State testified that the product in question contained 2 7/10 per cent of butter fat, and while the defendant's chemist testified to the contrary we are bound by the finding of the jury that it did in fact contain less than 8 per cent butter fat, and whether it contained 2 per cent, 5 per cent or 7 per cent makes but little difference, for in passing on the constitutionality of the act we must consider ice cream containing all amounts up to merely a fraction less than 8 per cent.

It is important here to note that the State does not contend that products containing less than 8 per cent of butter fat have now ceased to be ice cream. On the contrary, they contend that all products which formerly were ice cream still are ice cream, but that you cannot sell them under the name ice cream or under any other name. This is a distinction and an important distinction to be made with the Iowa case (No. 40, October term, 1916), for the Supreme Court of Iowa, inferentially, at least, holds such a statute as this to be unconstitutional, recognizing the force of the case of Rigbers *vs.* City of Atlanta, 66 S. E., 991 (Record, Hutchinson Ice Cream Co. *vs.* State of Iowa, No. 40, October term, 1916, p. 18). The Supreme Court of Iowa holds that in Iowa ice cream containing less than the specific percentage of butter fat and made of ingredients other than those set forth in the statute can be sold, *but not as ice cream* and that the products "formerly known as ice cream, but containing a lower per cent of fat than that prescribed by statute, is not prohibited." Under this Pennsylvania act ice cream *containing less than 8 per cent butter fat* cannot be sold at all under any name. The Pennsylvania act does *not* declare that ice cream shall not contain less than 8 per cent of butter fat. If it had so declared, then products containing less than 8 per cent of butter fat would have ceased to be entitled to the name "ice cream" if the statute

were valid, and we would have the same situation as in Iowa.

An indictment under such a statute would set forth that the defendant had sold a product as ice cream which was not in fact ice cream, in that it did not contain 8 per cent of butter fat. Here the defendant is charged with selling *ice cream*, not imitation ice cream or a product as and for ice cream, but ice cream itself, and the jury found that the defendant did sell ice cream, and all the testimony in the case was to the effect that this product which the State says contained 2 7/10 per cent of butter fat was in fact ice cream within the common meaning of the term. The court in charging the jury said (Rec., 80):

> "What is ice cream? Mr. Pelton says he bought it for ice cream. His testimony tends to show that it was ice cream and the testimony of the chemist who analyzed it also is to the effect that it was ice cream."

This statement of the court is borne out by the testimony of Mr. Pelton (Rec., 22). The testimony of Mr. Evans, chemist, offered for the State, also supports the statement of the court (Rec., 28-29).

We have the question squarely before us, Can the State under the police power arbitrarily say that ice cream containing less than 8 per cent butter fat cannot be sold at all?

This question, we submit, has been answered in the negative by the Supreme Court of Iowa (Hutchinson Ice Cream Co. *vs.* Iowa, No. 40, October term, 1916) and also by the Court of Appeals of Georgia in the case of Rigbers *vs.* Atlanta, 66 S. E., 991, where the court said in part:

> "Ice cream, however, is a luxury rather than a necessity. Still, since it is a foodstuff, the regulation of the sale of it, so far as is necessary for the prevention of impurities, adulterations, and other similar things likely to affect the health of those using it, is also within the police power of the city; and if this ordinance, so far as the sale of cream is concerned, had that end in view, the court should not

declare it to be unreasonable or beyond the powers granted by the city charter. The complaint against the defendant's ice cream was not that it was impure or that it contained deleterious substances, or that it was likely to affect the public health, but that it was not rich enough in butter fats. The defendant, for the purpose of showing the invalidity of the ordinance as a health measure, offered to prove that the presence of this amount of butter fats was not essential to the ice-cream's being healthful—that the ice cream he was selling was just as good, from a sanitary standpoint, as the ice cream of the character prescribed by the ordinance would be. This evidence was admissible. The rule is that where an ordinance is not passed by express authority of the legislature, the courts may inquire into its reasonableness, and to that end may hear testimony.

"It is plain, from the ordinance itself, however, that 10 per cent or 12 per cent of butter fats is not essential to the wholesomeness of milk or of milk products, for, as to the milk itself, there is a prescribed percentage of 3.6 per cent of butter fats.

"Indeed, to state the matter with perfect fairness, the city does not really insist that the portion of the ordinance relating to the richness of ice cream was enacted for the protection of the public health, but rather insists that this part of the ordinance is valid as a measure for the protection of the members of the general public against being cheated by having ice cream of inferior value furnished them. It may be a serious question as to whether the provisions of the pure-food law of this State are not broad enough to take away from municipalities the right to prescribe standards of foodstuffs for the purpose of protecting the public from impositions not directly affecting the public health, but it will not be necessary to decide that point here.

"It will be noticed that under this ordinance the prohibition is not against selling ice cream of less than the prescribed percentage as ice cream, but against selling it at all. Though the seller distinctly informs the purchaser that the ice cream contains less butter fats than 10 per cent, the sale is unlawful, according to the ordinance. Even if the city has the

power to prescribe that no ice cream of less than a certain percentage of richness in butter fats shall be sold as standard ice cream, it still would not have the power to say that ice cream below that standard should not be sold at all.

"For instance, it might be permissible to say that the term 'ice cream,' or 'standard ice cream,' or 'first-class ice cream,' should relate only to ice cream of a certain prescribed richness, and that whoever sold ice cream of poorer quality should either by calling it under some other name, or by indicating on the vessel in which it is delivered, or otherwise, disclose the inferiority of its quality. But under the ordinance before us, if a physician desired that a patient should have ice cream, but did not deem it safe for him to take the richer ice cream, it would be illegal for anyone to furnish the grade of ice cream actually suited to the sick man's physical condition."

Under this statute a man could not sell an ice cream containing 7 per cent if he put a label on it (which would do away with the question of fraud or deceit), saying it contained only 7 per cent. His ice cream contains less than 8 per cent. It is ice cream, so he cannot call it anything else, as for example, "frozen dainties." He cannot sell it under any other name (if he did he could be convicted on proof that his product really was ice cream). He cannot sell it even if he verbally informs the purchaser that it does not contain 8 per cent of butter fat or puts a label upon it giving not only the fat percentage, but each ingredient.

What is the effect of this enactment? It does not define ice cream; does not allege that ice cream containing less than 8 per cent of butter fat is adulterated or is a substitute, but, on the other hand, it recognizes as ice cream products which do not contain 8 per cent, and yet it expressly prohibits their sale. Can the State prohibit the sale of a product which they do not claim is an adulterated product or a substitute for any other product and which is admittedly a wholesome and healthful product?

The situation presented is that a manufacturer cannot sell his product unless it contains 8 per cent of butter fat, even though it is a better, richer and more costly food than an 8 per cent ice cream (see Point I), and a consumer cannot buy such ice cream, no matter how much he may desire to so do.

Could the legislature say that candy could not be sold unless it contained a certain percentage of sugar? If it did, would the court listen long to an argument that sugar was the "food value" of the candy? Yet we have this same situation here. Ice cream is a confection—it is eaten, not for its food value, but because of its pleasing flavor—its appeal to the taste, because of its sweetness or coolness rather than upon either the fat or solid content.

Judge McHenry, in the District Court of Iowa, said:

> "If the Legislature of Iowa can prescribe that ice cream shall contain 12 per cent of butter fat and prevent the sale of it without that ingredient they may equally provide that no baker shall sell cake unless it contains 20 per cent by actual weight of pure eggs to the pound of cake. They may also provide that no hotel keeper shall serve soup to his customers, without six per cent of animal fat therein, and both the manufacturer and the purchaser would be bound by this act of the legislative body."

No case can be found that will sustain the contention that under the police power a legislature may forbid the sale of a wholesome product under its own name. The cases are all to the contrary.

In State *vs.* Hanson, 136 N. W., 412, the Supreme Court of Minnesota considered an oléomargarine case. The act prohibited the sale of oleo "unless made and kept free from all coloration or ingredients causing it to look like butter of any shade or tint of yellow." The court said in part:

> "The legislature says to them by this act: 'You cannot have what you want; you must either buy butter made from cream, or you must buy oleomar-

garine that is white.' Unless the prejudice of the people against the white color is removed, this is a command that they buy butter, and pay higher prices. It is impossible to appreciate why the public should not have a free choice, why butter should not be sold on its merits to those who want it, and why those who want oleomargarine of a yellow shade should not be permitted to have it."

And again:

> "That this makes the law, in so far as it prohibits the manufacture or sale of oleomargarine made of a shade or tint of yellow, repugnant to both national and State constitutions, is a conclusion that follows inevitably. The decision in the Hammond Packing Co. case directly recognizes this, and practically holds that the law involved in that case would be unconstitutional, if construed as we have felt obliged to construe the law involved here. It is in fact conceded that the legislature had no right to prohibit the manufacture of oleomargarine. *It being a wholesome article of food, a statute prohibiting its manufacture or sale cannot be upheld.* State *vs.* Hammond Packing Co., *supra;* State *vs.* Hanson, 84 Minn., 42; 86 N. W., 768; 54 L. R. A., 468." (Italics ours.)

The Marx case (People *vs.* Marx, 99 N. Y., 384) declared the New York oleomargarine act unconstitutional on the ground that it prohibited, not the manufacture of an "imitation" of dairy butter, but of an article to "take the place of butter" (see pages 383, 384). This case holds that the State cannot forbid the sale of a wholesome article of food under its own name.

The court, at page 387, points out the danger of such a doctrine, saying:

> "Measures of this kind are dangerous even to their promoters. If the argument of the respondent in support of the absolute power of the legislature to prohibit one branch of industry for the purpose of protecting another with which it competes can be

sustained, why could not the oleomargarine manufacturers, should they obtain sufficient power to influence or control the legislative councils, prohibit the manufacture or sale of dairy products? Would arguments then be found wanting to demonstrate the invalidity under the Constitution of such an act? The principle is the same in both cases. The numbers engaged upon each side of the controversy cannot influence the question here. Equal rights to all are what are intended to be secured by the establishment of constitutional limits to legislative power, and impartial tribunals to enforce them."

Mr. Justice Cullen, of the New York Court of Appeals, in People *vs.* Biesecker, 169 N. Y., 53, discusses the principles laid down in the milk standard and oleomargarine cases, and says, at page 57:

> "From these cases the following propositions may be deduced: 1. *That the legislature cannot forbid or wholly prevent the sale of a wholesome article of food.* * * *
>
> "Still, that distinction is narrow and I imagine that the sale and consumption of a well-known article of food or a product conclusively shown to be wholesome, could not be forbidden by the legislature even though it assumed to enact the law in the interest of public health. The limits of the police power must necessarily depend in many instances on the common knowledge of the times. *An enactment of a standard of purity of an article of food, failing to comply with which, the sale of the article is illegal, to be valid must be within reasonable limits and not of such a character as to practically prohibit the manufacture or sale of that which, as a matter of common knowledge, is good and wholesome.*" (Italics ours.)

In the court below the State challenged this statement and contended that the State could prohibit the sale of a food product, whether it was wholesome or not. On argument it was said that the legislature could prohibit the sale of white

bread—and permit the sale of rye bread or *vice versa*. For this position they cite the case of Powell *vs.* Pennsylvania, 127 U. S., 678.

This much-discussed case was upon a writ of error from the Supreme Court of Pennsylvania, which Supreme Court had held constitutional an act which was almost word for word with the act which was declared in the Marx case (Peo. *vs.* Marx, 99 N. Y., 384) to be unconstitutional. The modern opinion is that the Court of Appeals was correct in its decision, while the Powell case stands alone as the opinion of the Supreme Court of Pennsylvania. It is contended that the United States Supreme Court, by refusing to reverse the Supreme Court of Pennsylvania, has accepted the decision which, it is contended, holds that the sale of oleomargarine, even if it be a healthful product, may be absolutely forbidden under the police power.

In 1887, when the Powell case was heard by this court, it turned entirely upon a question of evidence. The court held that as the statute declared that the act was to promote the public health they could not, in the absence of conclusive testimony, go back of this declaration of the legislature. At page 684 of the opinion, the court discusses the offer, made by the defendant, in the court below, to show that the *particular oleomargarine sold by him* was pure and wholesome, and states in substance that the offer was not broad enough, for he did not offer to prove that *most kinds* of oleomargarine offered on the market did not contain ingredients which were injurious to health, and it was on this point, to wit, that there was no proof by Powell that oleomargarine generally was wholesome, that the court sustained the Pennsylvania court, holding in fact that the declaration in the act was conclusive. (See opinion by Gray, J., in Schollenberger case, 171 U. S., 26, where this is discussed.)

We see here that the Powell case is not therefore a decision that the legislature can prohibit the sale of a wholesome article of food, but merely a decision that in the absence of proof to the contrary the legislative declaration that a cer-

tain article of food is unwholesome i[illegible]e accepted by the court.

It must be noted that there is no question of wholesomeness in our case here. The court below quashed an indictment, which alleged that ice cream was adulterated. The legislature here does not say that ice cream containing less than 8 per cent butter fat is adulterated, but merely that it cannot be sold.

Ten years later, in the Schollenberger case (171 U. S., 1), the court held flatly that oleomargarine was a healthful product, citing with approval the Marx case, and taking into consideration all the facts of knowledge in reference thereto (p. 12), which facts they had refused to consider in the Powell case, owing to a limited offer of proof made by Powell.

As the law stands under the Schollenberger case the court takes judicial notice of the nature of products, and considers the real objects of statutes, not their declared purposes (Lochner *vs.* N. Y., 198 U. S., 45). No such presumption as that indulged in the Powell case would be recognized, for as was said in McFarland *vs.* American Sugar Ref. Co., 241 U. S., 79:

> "As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.' Mobile, J. & K. C. R. Co. *vs.* Turnipseed, 219 U. S., 35, 43; 55 L. Ed., 78, 80, 32 L. R. A. (N. S.), 226; 31 Sup. Ct. Rep., 136; Ann. Cas. 1912A, 463, 2 N. C. C. A., 243. The presumption created here has no relation in experience to general facts."

Having established, first, that this statute itself absolutely prohibits the sale of a wholesome article of food, and second, that the prohibition of the sale of a wholesome article of food

cannot be supported under the police power, we wish now to direct the attention of the court to the fact that this so-called 8 per cent standard is a purely arbitrary one. A reasonable basis must be found if it is allowed to stand. What possible basis is there for this 8 per cent standard? Why 8 per cent butter fat any more than 7 per cent, and why not 9 per cent instead of 8 per cent? The answer is that there is no basis whatsoever, but it is purely arbitrary and it is also unreasonable, for we find that many kinds of ice cream do not contain 8 per cent of butter fat, and the legislature recognizes this by recognizing these kinds as ice cream. If the legislature can say that no ice cream containing less than 8 per cent of butter fat can be sold, and if they can fix 8 per cent at one session, they can change it to 2 per cent at the next session, or 16 or 30 per cent at the following session, and any of these percentages would have just as much and no more basis than the present arbitrary 8 per cent.

This is pointed out in the opinion of Mr. Justice Hughes in the case of Truax *vs.* Raich, 229 U. S., 33, where he says:

> "If the restriction to 20 per cent now imposed is maintainable, the State undoubtedly has the power, if it sees fit, to make the percentage less. We have nothing before us to justify the limitation to 20 per cent save the judgment expressed in the enactment, and if that is sufficient, it is difficult to see why the apprehension and conviction thus evidenced would not be sufficient were the restriction extended so as to permit only 10 per cent of the employees to be aliens, or even a less percentage; or were it made applicable to all businesses in which more than three workers were employed instead of applying to those employing more than five. We have frequently said that the legislature may recognize degrees of evil and adapt its legislation accordingly (Consolidated Coal Co. *vs.* Illinois, 185 U. S., 203, 207; 46 L. Ed., 872, 875; 22 Sup. Ct. Rep., 616; McLean *vs.* Arkansas, 211 U. S., 539, 551; 53 L. Ed., 315, 321; 29 Sup. Ct. Rep., 206; Miller *vs.* Wilson, 236 U. S., 373, 384; 59 L. Ed., 627, 632; 35 Sup. Ct. Rep.,

342); but underlying the classification is the authority to deal with that at which the legislation is aimed."

Not only is there no reasonable basis for this 8 per cent butter fat regulation, but it provides an arbitrary classification by making allowance for fruit and nuts, while it makes no allowances for eggs and other ingredients, though the statute itself permits the use of eggs. That such a classification is unlawful, see cases of People *ex rel.* Farrington *vs.* Mensching, 187 N. Y., 8, where it is said:

> "The classification must be such as in the nature of things suggests and furnishes a reason and justifies the making of the class. The reason must inhere in the subject-matter, and must be natural and not artificial. Neither mere isolation nor arbitrary selection is proper classification. (G., C. & S. F. Ry. Co. *vs.* Ellis, 165 U. S., 150; Cotting *vs.* K. C. S. Co., 183 U. S., 79; Connolly *vs.* U. S. P. Co., 184 U. S., 540; Matter of Pell, 171 N. Y., 48; People *vs.* O. C. R. C. Co., 175 N. Y., 84; Ruhstrat *vs.* People, 185 Ill., 183; People *ex rel.* McPike, *vs.* Van DeCarr, 91 App. Div., 20; 178 N. Y., 425; Wright *vs.* Hart, 182 N. Y., 330; People *vs.* Beattie, 96 App. Div., 383; People *ex rel.* Appel *vs.* Zimmerman, 102 App. Div., 103.)"

Further, it discriminates between dealers who manufacture ice cream without using fruit or nuts for flavoring and those who do use nuts for flavoring, thereby denying the former the equal protection of the law. All recent U. S. Supreme Court decisions on this point are reviewed in—

State *vs.* Miksicek, 125 S. W., 501.

The question whether a particular regulation is a valid exercise of the police power is ultimately a judicial, not a legislative question.

Dobbins *vs.* Los Angeles, 195 U. S., 223.

Lochner *vs.* New York, 198 U. S., 45.

Atchison, T. & S. F. R. Co. *vs.* Vosburg, 238 U. S., 56.
Coppage *vs.* Kansas, 236 U. S., 1.
Price *vs.* Illinois, 238 U. S., 46.

We submit that we have shown that the act absolutely prohibits the sale of a wholesome article of food, to wit, ice cream either under its own name or any other name; that the 8 per cent requirement is without basis, being purely arbitrary; that the allowance of 2 points for the use of fruit or nuts is arbitrary and discriminatory, and that therefore the act is not a proper exercise of the police power.

Point III.

The Act Does Not Tend to Prevent Fraud.

The court below upheld the act as being within the police power as tending to prevent possible fraud.

The court says (Record, p. 88):

> "We are only concerned, therefore, with the inquiry whether a statute which fixes a standard of quality for ice cream is within the police power. The purpose of the act was to suppress false pretenses and to secure honest dealing in the sale of an article of food. That ice cream is in general use is admitted; that it is largely composed of milk and cream is shown by the evidence in the case. Its name implies the use of cream in its composition and all of the authorities to which the learned counsel for the appellant refers show that milk and cream are constituents in its composition. It enters so largely into the food supply of the public as to have become a proper subject of legislation especially in view of the opportunities which its manufacture affords to practice imposition. In the popular understanding it is largely composed of milk, of which butter fat is an important constituent. If by the exercise of

ingenuity and by the practice of unwarranted thrift a product can be put on the market having the name and appearance of ice cream but lacking the chief element which gives its value as an article of food a large opportunity would be afforded to dealers in that article to profit by deception and it is the opportunity for such deceit of which the police power takes notice and seeks to take away. It is not necessary that injury has been done or a wrong perpetrated. The possibility that such results may take place warrants legislative intervention under the police power."

We have already shown that the statement of the court that the "name implies use of cream in its composition" is erroneous (Point I) and this is the whole basis of the court's decision. The court says in effect, people expect to get ice cream made of some cream and milk; therefore we uphold the 8 per cent requirement as requiring some "cream." Both statements are erroneous, and if they were not they would afford no basis for this arbitrary 8 per cent regulation; for we have shown that 8 per cent ice cream can be made with condensed milk and skimmed milk (Point I). What possibility of fraud is there? The sale of ice cream of one quality for ice cream of another quality? In the absence of misrepresentation (which a standard cannot prevent) there is no possible fraud.

We submit that there is no deception in selling an ice cream containing no more than 6, 4, 2, or even no percentage whatever of butter fat. As long as it is ice cream, and it may be in any of these instances, and if it pleases the customer, who has not specified or even *intimated* that he wanted any particular percentage or any particular amount of butter fat, he gets what he ordered and is not deceived or defrauded. The only case in which he would be deceived or defrauded is where he specified that the ice cream should be made only of cream or should contain a certain percentage of butter fat and the product sold him was not in accordance with the representations made. Here we have no

such case. The only representation was that the product sold was ice cream, and there can be no doubt that the product sold was ice cream within the common acceptation of the term.

If the court were to say that a man who purchases a 6 per cent ice cream is deceived or defrauded, what about the man who purchases an 8 per cent ice cream? Is he defrauded or deceived because, whether he knows it or not, he could have purchased next door ice cream containing 14 or 16 per cent? Or suppose he purchased a 16 per cent ice cream; if next day he purchases from another dealer a 9 per cent ice cream, is he deceived or defrauded in the second instance. In all cases he gets ice cream, which is what he asked for, and he certainly is not deceived. A customer will regulate his purchases by his taste and pocket book, and the manufacturer has the right to fulfill the demand and to sell a wholesome product, under its proper name, which the public taste demands.

If we accept the testimony in the case that the ice cream in question contained but 2 7/10 per cent of butter fat, was the man who bought it defrauded? It was rich in milk solids and flavored with good chocolate, was palatable and cold, and it was *ice cream*—just what the customer asked for. Can we say that because the statute required 8 per cent the customer was defrauded? That is what the State says; but that is assuming the very point in controversy—assuming the validity of the statute. Without the statute there is no possibiliy of fraud in the absence of actual misrepresentation. The statute creates the possibility of fraud; for before its enactment the purchaser never thought or heard of a butter fat standard; had no right to assume that the product he was purchasing had any special percentage or any percentage of butter fat. Customers had the right to assume that no other than customary ingredients were used in the product. They still have just the same right, for the statute has not attempted to limit ingredients. They had no right to assume or believe that they were purchas-

ing any particular kind or quality of ice cream any more than they would be justified in assuming that the cloth in a suit of clothes was all wool.

Nor would the State be justified in forbidding the sale of clothing unless it contained a certain percentage of wool—on the theory of the possibility of some one believing that all cloth contained some wool, and not only some wool, but at least the arbitrary percentage of wool that the legislature selected.

The limit to which this court has gone is to require labeling of different grades of the same commodity. In Heath and Milligan Co. *vs.* Worst, 207 U. S., 338, this court held a labeling statute relating to paints to be valid. That it would not have held a statute valid which prohibited the sale of all other *paints as paint* unless they conformed to the statutory definition we believe is forecasted by the opinion of Mr. Justice McKenna in that case. In other words, while labeling may be required, sale cannot absolutely be prohibited (Coppage *vs.* Kansas, 236 U. S., 11; Murphy *vs.* California, 225 U. S., 623).

The oleomargarine cases cited below relate and refer to the possibility of the sale of one product as and for another—the possibility of the sale of oleo as butter. They had no relation to the sale of one grade of oleo for another grade of oleo, or one grade of butter for another grade of butter.

Here the question is not of the sale of a substitute for a product, but of the product itself, and the oleomargarine cases are not in point.

State *vs.* Layton, 61 So. W. Rep., 171.
Peo. *vs.* Biesecher, 169 N. Y., 53.
State *vs.* Hanson, 136 N. W., 412.

The court below relies on the milk-standard cases. The milk-standard cases are not in point, for we find that milk has been standardized, because it is a natural product, the

adulteration of which is such a simple matter. Milk has always been composed of the same constituents, though in different breeds and different animals of the same breed the porportion of these constituents may vary to some extent. Notwithstanding the known fact of this variation in the milk of different cows, not a variation in the kind and number of constituents, but in their relative proportions, it was deemed necessary, milk being among the necessities of life, to standardize milk, practically as a health measure, but chiefly to prevent fraud in a common necessity of life; in other words, to prevent the adulteration of a natural product by the addition of water. This distinction is clearly pointed out in Rigbers *vs.* City of Atlanta, 66 So. Eastern, 991, where the court contrasts milk with ice cream. Ice cream is not a natural product; it is a manufactured product; an artificial compound without well-defined limits as to the variety or number of ingredients and without fixed proportions for such ingredients as may be used. On the other hand, milk, as has been pointed out, always has the same kind and number of constituents, the proportions of which, not of one but of all, have been fixed for legal milk and standards based on the fair average of thousands of tests have been enacted.

Ice cream is not a milk product. In many ice creams of excellent quality (some of them lawful under this act and some unlawful) the sugar alone exceeds the total milk solids, and where eggs are used the weight of the eggs also often exceeds the weight of the total milk solids, and other ingredients valuable as food may also be added. The act itself recognized that ice cream is not a milk product and places no limit on the number or variety of ingredients, but only requires—and this without reason—that, regardless of the number and amount and food value of the ingredients, a specified percentage of butter fat shall be maintained. The act does not even require that there shall be any milk or cream in ice cream, but only that there shall be present the

specified percentage of butter fat. Counsel for the State argued to the court below that in effect the act requires a certain proportion of milk and cream "because no ice cream is made or can be made without cream or milk," and the court below accepted this view. Both counsel for the Commonwealth and the court failed to find any mention of milk or cream in the act. Counsel for the Commonwealth sought to show and the court below held that within the common knowledge ice cream is composed chiefly of milk and cream. We respectfully submit that it may not be held that only so much of the common knowledge, custom and usage as can be made to seem to support this act has force and weight, and, further, we submit respectfully that, because this act disregards lawful custom and usage and the common knowledge of the times, it must be held void and of no effect.

Milk is not a manufactured product and was not standardized on a basis that would permit it to be made of any ingredients so long as it contained a final specified percentage of butter fat. Could a man take butter and water and *make* a product and sell it as milk? Could he do it even if the product he made was better than natural milk? This so-called standardization forbids the sale of superior ice creams because a constituent element of one or more of its possible ingredients is not present in a certain percentage in the finished product. In a natural product such as milk it is always first provided, by a standard, that nothing shall be added to or taken away from the natural product, so that when a consumer buys milk that is standardized he knows, *first*, both the amount and percentage of butter fat he is receiving; *second*, the amount, percentage and nature or kind of the total of the other solids and what the said solids are, and, *third*, the amount of water naturally present in the milk. In this attempt to standardize ice cream, a manufactured product, the 8 per cent shows him none of these things, for he does not know the amount of butter fat he

is to receive, the amount or percentage of cream or milk or condensed milk or skimmed milk used in the manufacture, or whether or not any cream or milk were used at all; he does not know the amount or percentage of sugar, flavor or other ingredients used, and in fact he knows nothing at all about the product and is really deceived into believing that the percentage of butter fat is of importance, while as a matter of fact it is not, as has been conclusively shown.

The court below relies on State *vs.* Campbell, 64 N. H., 404; Commonwealth *vs.* Waite, 11 Allen, 264; State *vs.* Smyth, 14 R. I., 100.

The Waite case was a case where water was added to the natural product milk—a clear case of adulteration. The Campbell and Smyth cases construe statutes which declare milk not conforming to the standard to be adulterated, and the court therefore assumed that normal milk conformed to that standard and refused to hear evidence to the effect that the milk in question had not been adulterated.

Regardless of all other considerations, it is conclusive on the question here involved that the ice cream is not declared by the statute to be adulterated, while milk standards were upheld on the ground that the legislature had declared all other milk to be adulterated. Milk-standard acts, which have been sustained, all declare that all milk not conforming to the standard is adulterated, and the courts have held that evidence showing that milk which did not conform to the standard was not in fact adulterated would not be received. Here we have no standard. Ice cream not conforming to the regulation is not declared to be adulterated and there is no question of adulteration in the case, so the milk-standard cases are clearly not in point.

As no possibility of fraud existed before the enactment of the statute, there was no fraud to prevent, and therefore no case for the application of the police power.

No attempt, as far as we have been able to ascertain, has heretofore been made to prohibit the sale by legislative ac-

tion of all grades or types of a manufactured article except that particular grade or type selected by the legislature. If this enactment is to be sustained it must be on the broad ground that the legislature can forbid the sale of wholesome articles of food or of any grade or kind of manufactured articles—that it can arbitrarily say that only one kind of candy can be sold and that must contain 80 per cent of sugar—that sponge cake must contain a certain percentage of eggs—that gray paint cannot be sold unless it contains a certain percentage of lamp black—that shirts or collars cannot be sold unless they contain a certain percentage of linen—that thread must be made of silk—or any other of a thousand regulations which would be arbitrary and useless and tend merely to favor one grade of article at the expense of another and of the public generally. To sustain this decree would be to extend the limit of the police power to such an extent as to make our legislatures the battle ground where every manufacturer would seek to have his grade of goods made standard and the sale of all others forbidden.

Clearly this should not be done unless necessary to prevent fraud—and we submit that we have shown that no such necessity exists—that no possibility of fraud existed before the enactment of this statute—and of course will not exist when the statute is declared unconstitutional.

LASTLY.

We submit that the decree of the Supreme Court of Pennsylvania must be reversed.

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